Office Supreme Court, U. S.
FILED
MAR 5 1928
CHARLES ELMORE CROPLEY
CLERK

(13)

MEMORANDUM.

No. 269

AILEEN E. MITCHELL, TREASURER, ET AL., ETC.,

v.

J. W. HAMPEL ET AL., TRUSTEES, ETC.

The principle of contribution has no application to the facts of this case, but the partnership strangers who signed the bonds are entitled to indemnity as against the partnership members who subscribed them.

30 Cyc., 531;
The Swallow, Fed. Cas., No. 13665;
Corpus Juris, Vol. 13, 822;
Corpus Juris, Vol. 29, 169;
Moore *v.* Moore, 15 American Decisions, 523 (N. C. Supreme Court);
McDonald *v.* McGruder, 3 Peters, 470;
Opinion of the district judge in this case, Record, p. 62.
Gasquet *v.* Thorn, 14 La., 506;
Wysong *v.* Meyer, 58 N. Y. App. Div., 422;
Giltinan *v.* Strong, 64 Pa. St., 242;
In re Grays Est., 18 N. E., 719;
Turner *v.* Overall, 39 S. W., 757.

T. W. GREGORY,
W. N. FOSTER,
FRED SWITZER,
For Petitioners.

MEMORANDUM.

No. 269

AILEEN E. MITCHELL, TREASURER, ET AL., ETC.,

v.

J. W. HAMPEL ET AL., TRUSTEES, ETC.

The ruling of the circuit court of appeals and the lower court allowing Fort Bend County's claim for the full amount, without deduction of the $108,000 that had theretofore been paid by the partnership strangers, sureties on the bond, was correct and should be sustained.

U. S. Compiled Statutes (1916), Sec. 9641, Subdivision I;

In re Noyes Bros. (C. C. A.), 127 Fed., 286;

Swartz *v.* Fourth National Bank (C. C. A., 8th Circuit), 117 Fed., 1;

In re Heyman, 95 Fed., 800;

Stewart *v.* Armstrong (C. C. A.), 56 Fed., 167;

Insley *v.* Garside (C. C. A., 9th Circuit), 121 Fed., 699.

T. W. GREGORY,
W. N. FOSTER,
FRED SWITZER,
For Petitioners.

(14)

Office Supreme Court, U.
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No. 11[redacted]2 69

IN THE

Supreme Court of the United States

October Term 1927

AILEEN E. MITCHELL (Successor of C. Minkwitz, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al.,
Petitioners,

v.

J. W. HAMPEL ET AL., Trustees in Bankruptcy, etc., et al.,
Respondents.

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

— BY —

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.

C. C. YOUNG PRINTING COMPANY, HOUSTON

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IN THE

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AILEEN E. MITCHELL (Successor of C. Minkwitz, Former Treasurer of Fort Bend County, Texas), as Treasurer of Fort Bend County, Texas, et al.,
Petitioners,

v.

J. W. HAMPEL ET AL., Trustees in Bankruptcy, etc., et al.,
Respondents.

No. 1153

ANSWER OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Preliminary Statement.

Respondents believe a more complete statement of the facts is necessary for an understanding of the theory of law on which the decision of the Circuit Court of Appeals for the Fifth Circuit is based. This statement is as follows:

1. In February, 1921, J. H. P. Davis & Company,

bankers, unincorporated, of Fort Bend County, Texas, who, on competitive bids, had been chosen as county depository of that county, executed a bond under the requirements of Chapter 2, Acts of the Thirty-fifth Legislature, by the terms of which it obligated itself to pay to the County Judge of Fort Bend County, Texas, the sum of $300,000.00, conditioned as required by law. J. H. P. Davis & Company, by J. H. P. Davis, signed the partnership name as principal, and thereafter J. H. P. Davis, T. A. Wessendorff, R. E. L. Wessendorff, E. Foerster, T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom and J. W. Slavin signed their names as sureties. (Tr. p. 42.) There was also a similar bond for $50,000.00. (Tr. p. 15.) In due course of time said partnership became insolvent, and both the partnership itself and its surviving members, on March 31st, 1923, executed a general assignment under the laws of the State of Texas for the benefit of creditors, and appointed a Trustee, who qualified and acted as such until the 7th day of August, A. D. 1923, when said partnership firm and each of said members, to wit, J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, were duly adjudicated bankrupt by the District Court of the United States for the Southern District of Texas —T. A. Wessendorff, a member of said firm, having theretofore committed suicide, to wit, March 21st, 1923. (Tr. p. 62.)

2. After this assignment had been made for the benefit of the creditors, T. B. Wessendorff, T. W. Davis, R. S. Darst, A. P. George, Real F. Ransom and J. W. Slavin, each paid the sum of $6000.00, or a total of $36,000.00, and, after said adjudication of bankruptcy,

the last six named sureties on said county depository bond for J. H. P. Davis & Company, and who were not members of said partnership firm, paid on account of the indebtedness to said treasurer in consequence of the failure of said unincorporated bank, the sum of $12,000.00 each, or a total of $72,000.00. These respective payments were applied by said treasurer on account of and as a credit of $108,000.00 upon the total indebtedness to the county, which amounted to $334,136.24. (Tr. p. 33.)

3. After these payments had been made by said sureties, C. Minkwitz, in the capacity of Treasurer of Fort Bend County, filed a claim on behalf of said county, on August 22nd, 1923 (Tr. p. 17), but subsequently amended same, and as amended claimed:

(*a*) Against the partnership estate of J. H. P. Davis & Company for the entire amount of $334,136.24, without giving credit for the $108,000.00, or any part thereof, received as payment from said sureties, as aforesaid; and,

(*b*) Against individual estates in bankruptcy of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the entire amount of $334,136.24, without giving credit for the amount received from said sureties, which credit, as above stated, amounted to $108,000.00. (Tr. pp. 4-17.)

4. J. W. Hampel, Geo. Hamman and T. J. Holbrook, as Trustees for J. H. P. Davis & Company, and I. R. Bryan, for himself and other creditors, opposed the making of double proof by and allowance of a preference to Fort Bend County, and the sureties on said bond not members of the partnership, and thereupon filed

their contest and opposition to the allowance of double proof and preference, and also, in the alternative, to the allowance of the entire claim of said Treasurer for the county without taking into account the payments which had been made by said sureties in the sum of $108,000; and they also claimed, in the alternative, that if double proof could be made, and preference given Fort Bend County, and the sureties not members of the partnership, the equitable principle of contribution covering the obligations of sureties among themselves, as well with their principal should apply (Tr. pp. 18, 24, 27); but on hearing before the Referee in Bankruptcy on the 5th day of December, 1924, the contest of said allowance was overruled and denied, and the claim was allowed, both against said partnership estate and said individual estates of J. H. P. Davis, R. E. L. Wessendorff and E. Foerster, for the entire amount of $334,136.24 (Tr. p. 63); the Referee filed his findings and his certificate. (Tr. pp. 41, 42.) The effect of this double allowance was to give priority to said claim over the claims of all the other general creditors of the partnership insofar as it related to said individual estates of the members of said firm in bankruptcy.

5. Feeling themselves aggrieved by the rulings of the Referee, the said J. W. Hampel et al., as Trustees of said J. H. P. Davis & Company, and also I. R. Bryan and other creditors, filed a petition for review before the Honorable United States District Court for the Southern District of Texas. (Tr. p. 65.) On hearing had before that court, the ruling of the Referee was sustained and a decree was entered allowing the making

of double proof and preference, as aforesaid, for the entire claim. (Tr. p. 74.)

6. Thereupon, the Trustees of said J. H. P. Davis & Company and said creditors, feeling themselves aggrieved by the ruling and decree of said District Court, seasonably filed their petition for appeal to the Circuit Court of Appeals for the Fifth Circuit, which court upon hearing reversed the judgment of the District Court in an opinion found on pages 103 to 105 of the Transcript of Record.

7. On the hearing before the Referee, one of the partners, E. Foerster, and one of the depositors in said bank, Mason Briscoe, testified that it was represented by the partners and generally understood by the creditors of said bank that everything that the bank had, including everything that J. H. P. Davis and the other partners had individually, except personal exemptions, was absolutely behind every cent on deposit in said bank. (Tr. pp. 51 to 56.)

8. If Fort Bend County and the sureties other than the members of the partnership be given a preference over the other general creditors out of the individual estates of the partners, the other general creditors, including hundreds of depositors of the bank, will be paid approximately 40 cents on the dollar, but under the decision of the Circuit Court of Appeals for the Fifth Circuit in this case all the creditors will be paid approximately 80 cents on the dollar of their claims.

The Circuit Court of Appeals for the Fifth Circuit did not err in reversing the judgment of the District Court, because:

I.

The decision of the Circuit Court of Appeals for the Fifth Circuit properly determined the rights of the parties to a non-negotiable contract, an indemnity bond wholly the creature of the statutory law of the State of Texas, in accordance with the law of the State of Texas.

Authorities.

Vernon's Sayles' Civil Statutes 1914, Art. 2443.
Revised Statutes of the State of Texas, 1925, Art. 2547.

The foregoing statute provides as follows:

"Within five days after the selection of such depository it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the county judge and his successors in office, to be approved by the commissioners court and comptroller and filed in the office of the clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond, or of as great value as the amount of all of said bonds when more than one bond; and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made. Nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. The commissioners court may accept in lieu of such real estate or surety company, security bonds of the United States, or of this State or of any county, city, town or independent school district in the State,

which shall be deposited as the commissioners court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depositary by the county treasurer of the county, and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

II.

The substantive law of the State of Texas, where the contract (bond) was executed and was to be performed, determined whether the members of the co-partnership of J. H. P. Davis & Company could become sureties on the foregoing statutory bond, and whether by attempting to sign as sureties they created any individual obligation in favor of Fort Bend County and the sureties on said bond who were not members of the firm in contradistinction from their individual obligations as members of the co-partnership of J. H. P. Davis & Company.

Authorities.

Samuel A. Meyers v. International Trust Co., U. S. Sup. Ct. Advance Opinions 1926-1927, p. 417.
Trinity Portland Cement Co. v. Lion Bonding & Surety Co., 229 S. W. 483.

III.

Under the substantive law of the State of Texas, the

members of the co-partnership of J. H. P. Davis & Company were jointly and severally liable to the creditors of the firm, and they could not make themselves individually liable in contradistinction from their individual liability as such members of the firm by attempting to become sureties on their co-partnership bond, the debt created by the bond being exclusively for the benefit of the partnership.

Authorities.

Vernon's Sayles' Civil Statutes, 1914, Art. 6127.
Revised Statutes of Texas, 1925, Art. 6111.
Fowler Commission Co. v. Charles Land & Co., 248 S. W. 314.
Bank v. Cup & Company, 59 Tex. 268.
Laning v. Bank, 36 S. W. 431.

IV.

The assets of the partnership and the assets of the individual partners having been drawn into the administration of the bankruptcy court, the Circuit Court of Appeals for the Fifth Circuit, in refusing to allow the claim of Fort Bend County and the sureties on the depository bond who were not members of the partnership to be approved for the full amount of $334,136.24 against both the partnership estate of J. H. P. Davis & Company and the individual estates of the partners, which was not credited with the sum of $108,000.00 already paid thereon, correctly prevented, under Section 5, Subdivision (g), of the Bankruptcy Act, Fort Bend County and the said sureties from getting in every equitable sense an inequitable preference, and has thereby secured to all creditors an "equitable distribu-

tion of the property of the several estates" as intended by said section of the Bankruptcy Act.

Authorities.

Section 5, Subdivision (g), Bankruptcy Act.
Fort Pitt Coal & Coke Co. v. Diser et al., 239 Fed. 443.
Schall v. Camors, 251 U. S. 239.

Review of Authorities Under the First Proposition.

This court, in Meyers v. International Trust Company (February 21st, 1927, opinion by Mr. Justice Sandford), had occasion to determine whether an indorsement by a partner on a note of the partnership in Massachusetts created an individual liability, and reached the conclusion that it did, because it was settled under the laws of Massachusetts that a partner who indorsed a firm note as an individual incurs—in addition to the liability for partnership debts arising from his membership in the firm—a distinct and separate liability.

Probably this application of the substantive law of Massachusetts by this court will explain the authorities cited by the petitioner as being in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. Most States have adopted the Uniform Negotiable Instruments Law. Under it a partner who becomes a surety on a partnership note creates a separate and distinct obligation from that as partner, because under the law merchant this character of paper is intended to pass in channels of commerce without question to facilitate trade, and no person taking such paper

in payment for goods, perhaps far distant from the place of its origin or the residence of its maker and indorser, should be required to ascertain whether the indorsement gives it any added security. This is forcibly expressed in Daniel on Negotiable Instruments, Section 303, where it is said:

> "No party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed. The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is 'courier without luggage,' whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal, party thereto, unless his name in some way is disclosed upon the instrument itself; although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly."

Again, it was said in the case of Fourth National Bank v. Mead, 216 Mass. 521, 104 N. E. 377, that a member of a partnership placing his name on the back of a firm note *"is a person not otherwise a party"* to the instrument within the meaning of the Negotiable Instruments Act, and will *make him liable as indorser.*

Hence, it is clear that the decisions giving the holder of negotiable notes executed by a partnership and indorsed by the individual members of the firm the right to double proof are not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in

this case, since this suit involves a statutory bond on which the partners could not obligate themselves individually in contradistinction from their individual or several liability as partners thereon as principals. This is the rule in Texas, and that rule is a part of the bond. The Commission of Appeals of Texas, on March 9th, 1921, in a decision styled Trinity Portland Cement Company v. Lion Bonding & Surety Company, 229 S. W. 483, which decision was adopted and entered by the Supreme Court of the State of Texas as its judgment, held:

> "The principles and rules of law applicable to the construction of contracts are so elementary and so familiar to the profession that it is unnecessary to set them forth. It is sufficient to say that all parties in anywise connected with the contract were presumed to know the law, and that the instruments above quoted from must be construed together, and be construed also in connection with the statute above cited, which by conclusive implication of law was written into the contract and became as much a part of the bond as though it were expressed therein, and the bond must be read and understood in the light of it."

Review of Authorities Under the Second Proposition.

Prior to the decision of the United States Supreme Court in the case of Francis v. McNeal, reported in 228 U. S. 695, rendered on May 26th, 1913, there were frequent judicial holdings that within the scope of the Bankruptcy Act a partnership was an entity separate and distinct from the members who composed it, and that, therefore, when a partnership was adjudicated a bankrupt, the individual estates of the parties who com-

posed the partnership were not drawn into the administration of bankruptcy. However, the McNeal case, by the Supreme Court, overthrew all those decisions which announced the erroneous principle mentioned. Mr. Justice Holmes, in delivering the opinion for the court, had occasion to say:

> "But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for it continuing out. The necessary and natural meaning goes no further than that."

Again he said:

> "Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between the firm and members under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the Act, is to administer both in bankruptcy."

In other words, this decision has set at rest the false notion that there is any distinction between the partnership and the members who compose it. In Texas, common law rules in respect to partnerships have been abolished, and contracts of partnership are joint as to all of the partners and several as to each of them. So

that it is not necessary in this State for a creditor of the partnership to sue the partnership in order to hold any individual members personally liable on the indebtedness. A creditor of the firm may sue just one of the partners in his individual capacity without proceeding at all against the partnership. This was the specific holding in Fowler Commission Company v. Charles Land & Company, decided by the Commission of Appeals and adopted by the Supreme Court of Texas, and entered as its judgment on February 28th, 1923, reported in 248 S. W. 314, where it was said:

> "In this State, common law rules have been abolished, and the contracts of a partnership are joint as to all of the partners and several as to each of them. A holder of a claim against a partnership may proceed against any of the partners individually, and it is not necessary to join either of the other partners or the partnership. As between the partners, equity may require a marshaling of joint assets in payment of joint liabilities, or require contribution from one member to another, where a partner has been required individually to pay a partnership debt, but this does not limit the right of creditors to select any individual of the firm and collect their claims wholly from his individual property."

The foregoing is the latest expression of the Supreme Court of Texas as to the legal status of the partnership and the individual partners, and re-affirms what has been the rule in Texas for an indefinite period in the past.

Review of Authorities Under the Third Proposition.

Under the substantive law of Texas a member of a partnership may not become a surety for the partnership, for while the question was not directly decided, it is significant that in Bank v. Cup & Company, 59 Tex. 268, the Supreme Court of Texas held that a stockholder of a corporation could sign an attachment bond as surety thereon, *because he was not a partner,* and the corporation was a distinct entity from the stockholder. The clear implication is that if it had been a partnership, the holding of the court would have been otherwise.

It was likewise held by one of the Courts of Civil Appeals of Texas in 1896, in a case styled Laning v. Iron City National Bank of Llano, Texas, 36 S. W. 431, that:

> "We do not think there is any merit in the proposition that the officers and directors of the bank could not become sureties on its bond for attachment. The bank is a corporation, in law a separate and distinct person from its stockholders, directors and officers; and, there being no statutory inhibition against it, we are satisfied that the directors and officers of the bank could properly become its sureties on the attachment bond."

Such also is the rule in the State of Louisiana, where in Bayne et al. v. Cusimano, 23 Southern, at page 361, the Supreme Court of Louisiana said in part:

> "The question presented is: Can an individual member of a co-partnership become surety on an attachment bond executed by his firm as principal? Is his such security as the law contemplates on a bond of this character? It is shown that the firm name was signed to the bond by Onorato, the

junior member, while Bayne, the senior, signed it as surety in his individual capacity. Because Onorato and not Bayne signed the name of the firm to the bond as principal can make no difference. If Bayne individually was legally competent as surety, he would be so even though he himself had already signed the firm name as principal. It is claimed that B. & O. is an ordinary, and not a commercial partnership, and from this it is concluded that as each partner is bound only for his share of the obligation of the bond—that is to say, for one-half thereof—nothing prevents one of the partners from becoming surety for his co-partner to the extent of the latter's liabiliy on the bond. While from the testimony found in the record touching the character of the business done by the firm, we are by no means satisfied that this partnership is to be classed merely as an ordinary one, in our appreciation of the question under consideration, it makes no difference whether the obligation of the partners on this attachment bond be solidary or each for his share only. B. & O. are required by law to give as surety on their attachment bond one good and solvent person. While it is true that in a sense a partnership is a legal entity distinct from the individual members composing it, there can be no doubt that the several members, as well as the partnership itself, must be viewed as principals on an attachment bond signed in the firm name for the purpose of taking out an attachment at the suit of the firm. And the extent of the individual liability of its members for the obligors of the partnership does not affect this. Mr. Bayne then is the principal in the attachment obligation. He is bound on the bond in that character. How could he be both principal and surety at one and the same time in the same obligation and for the same liability? We hold, therefore, that Bayne, one of the partners in the creditor firm suing out the attachment, is to be viewed as principal in the attachment bond, and

being such, could not become surety on the same bond."

It would be against a plain public policy, as evident from the wording of the statute itself, to accept the individual members of a partnership on the bond of the firm under this article, when the members of the partnership are already obligated severally as absolutely and with as much far-reaching effect by the execution of the bond by J. H. P. Davis & Company as though they had each signed their individual names as partners.

Review of Authorities Under the Fourth Proposition.

It seems that Section 5, Subdivision (g), of the Bankruptcy Act, gives the court power to

> "marshal the assets of the partnership estate and individual estates so as to prevent preference and secure the equitable distribution of the property of the several estates"

before it becomes the duty of the court to carry out the provisions of Section 5, Subdivision (f), of the Bankruptcy Act. In this case the Circuit Court of Appeals for the Fifth Circuit might have based its decision upon its power to secure the equitable distribution of the property of the several estates given by Subdivision (g) of Section 5 of the Bankruptcy Act, as was done by the Circuit Court of Appeals for the Sixth Circuit in Fort Pitt Coal & Coke Company v. Diser et al., 239 Fed. 443, in which Greer Brothers, a co-partnership composed of John L. Greer and Robert C. Greer were indebted to the Fort Pitt Coal & Coke Company, and on December 31st, 1914, executed a note payable to the Fort Pitt Coal

& Coke Company for $4000 and a note for $373.30, each of which notes was given to cover the indebtedness owing by the partnership, and each of which notes was indorsed by John L. and Robert C. Greer, and the $4000 note was secured by a chattel mortgage upon personal property of the firm and of the individual partners. Judgment was obtained on the note for $373.30 against the partnereship and the partners individually. In March of 1915 the partnership was adjudicated a bankrupt, and the estates of the individual partners were drawn into the bankruptcy court for administration, though the individual partners were not adjudicated bankrupts. The Bankruptcy Court held that technical preferences had been given to the Fort Pitt Coal & Coke Company, and disallowed the claim against the individual estates. The case was appealed to the Circuit Court of Appeals for the Sixth Circuit, where it was held, among other things:

> "Further, if we were in error in treating the acts of these two partners as preferences and as a wrongful appropriation of assets equitably belonging to the partnership creditors to the use of a single creditor of that class, it cannot escape attention that the practical effect of the acts of these partners is the same as it would have been had the partners, as well as the partnership, been adjudged bankrupt, in which case their acts would unquestionably have been open to a charge of technical preference; and in view of the facts already shown that the adjudication actually made resulted in drawing these individual assets into the jurisdiction and administration of the bankruptcy court, and since in every equitable sense these acts were the equivalents of technical preferences, the court itself might well set them aside in virtue of its

> power under Section 5g to 'marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates'."

The reason for giving partnership creditors preference in the distribution of partnership assets is that the law presumes that the partnership obligation was incurred to increase partnership property, and that separate liability was incurred to enhance the property of the individuals partners. And this principle was one, among others, on which this court based its decision in the case of William Schall et al. v. Frederic Camors et al., 251 U. S. 239-254, for it was said by Mr. Justice Pitney:

> "It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibiltiy of each partner for the frauds, they are liable *in solido* not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable, and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where, by reason of insolvency, it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give pe-

titioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. at L. 547, 548, Chap. 541, Comp. Stat., Sec. 9589, 1 Fed. Stat. Anno. 2d ed. p. 578) establishes on a firm basis the respective equities of the individual and firm creditors. *Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise.* And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm, and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors."

Wherefore, it is respectfully prayed that the petition for certiorari of petitioners be denied.

LEWIS R. BRYAN,
E. B. COLGIN,
Solicitors for Respondents.